6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2021-0257; FRL-10022-05-OAR]

California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Opportunity for Public Hearing and Comment.

SUMMARY: The Environmental Protection Agency (EPA) is reconsidering a prior action that withdrew a waiver of preemption for California's zero emission vehicle (ZEV) mandate and greenhouse gas (GHG) emission standards within California's Advanced Clean Car (ACC) program for purposes of rescinding that action. The ACC program waiver, as it pertains to the GHG emission standards and ZEV mandates, will become effective should EPA rescind the prior action. On September 27, 2019, EPA and the National Highway Transportation Safety Administration (NHTSA) issued an action titled "The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program" (SAFE 1) that included, among other matters, EPA's determination that the Agency had authority to reconsider the ACC program waiver and that elements of the ACC program waiver should be withdrawn due to NHTSA's action under the Energy Policy & Conservation Act (EPCA) and Clean Air Act (CAA) preemption provisions. In addition, SAFE 1 included EPA's interpretation of whether States can adopt California's GHG emission standards under section 177 of the CAA.

EPA believes that there are significant issues regarding whether SAFE 1 was a valid and appropriate exercise of agency authority, including the amount of time that had passed since EPA's 2013 waiver decision, the novel approach and legal interpretations used in SAFE 1, and

whether EPA took proper account of the environmental conditions in California and the environmental consequences from the waiver withdrawal in SAFE 1. Further, EPA will be addressing issues raised in several petitions for reconsideration of SAFE 1, including one filed by California (jointly with a number of States and Cities) and one jointly filed by nongovernmental organizations. Finally, on January 20, 2021, President Biden issued an Executive Order on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The President directed the Federal Agencies to "immediately review" SAFE 1, and to consider action "suspending, revising, or rescinding" that action by April 2021. Therefore, based upon the issues associated with SAFE 1, the petitions for reconsideration, and the Executive Order, this *Federal Register* notice initiates reconsideration of SAFE 1 and announces a virtual public hearing as well as an opportunity to submit new written comment.

DATES:

Comments: Comments must be received on or before July 6, 2021.

Public Hearing: EPA will hold a virtual public hearing on June 2, 2021. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing. Additional information regarding the virtual public hearing and this action can be found at: https://www.epa.gov/regulations-emissions-vehicles-and-engines/public-hearing-information-epas-notice-reconsideration.

ADDRESSES: *Comments*. You may send your comments, identified by Docket ID No. EPA–HQ–OAR–2021–0257, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- E-mail: *a-and-r-Docket@epa.gov*. Include Docket ID No. EPA-HQ-OAR-2021-0257 in the subject line of the message.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Air Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

- Hand Delivery or Courier (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this action. Comments received may be posted without change to *https://www.regulations.gov*, including any personal information provided. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets*.

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets*.

EPA continues to monitor information carefully and continuously from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

Public Hearing. The virtual public hearing will be held on June 2, 2021. The hearing will begin at 9:00 a.m. Eastern Time (ET) and end when all parties who wish to speak have had an opportunity to do so. All hearing attendees (including those who do not intend to provide testimony and merely listen) should notify the SAFE1Hearing@epa.gov email address listed under **FOR FURTHER INFORMATION CONTACT** by May 25, 2021. Once an email is sent to this address you will receive an automatic reply with further information for registration. Be

sure to check your clutter and junk mailboxes for this reply. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For questions regarding this proposed action, contact David Dickinson, Office of Transportation and Air Quality, Transportation and Climate Division, Environmental Protection Agency; telephone number: (202) 343-9256; email address: dickinson.david@epa.gov. To register for the virtual public hearing, contact SAFE1hearing@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Participation in Virtual Public Hearing

Please note that EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, EPA cannot hold in-person public meetings at this time.

EPA will begin pre-registering speakers for the hearing upon publication of this document in the *Federal Register*. To register to speak at the virtual hearing, please contact the email address listed in the **FOR FURTHER INFORMATION CONTACT** section. The last day to pre-register to speak at the hearing will be May 25, 2021.

Each commenter will have 3 minutes to provide oral testimony. EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. EPA recommends submitting the text of your oral comments as written comments to the rulemaking docket. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at

the public hearing. Please note that any updates made to any aspect of the hearing will be posted online at: https://www.epa.gov/regulations-emissions-vehicles-and-engines/public-hearing-information-epas-notice-reconsideration.

While EPA expects the hearing to go forward as set forth above, please monitor the website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. EPA does not intend to publish a document in the *Federal Register* announcing updates. A copy of the hearing transcript will be placed into the docket.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by May 25, 2021. EPA may not be able to arrange accommodations without advance notice.

II. Background

EPA is reconsidering a prior action that withdrew the January 9, 2013 waiver of preemption for the state of California's (California) Advanced Clean Car (ACC) program for purposes of rescinding the withdrawal action. The ZEV mandates and GHG emission standards within the ACC program waiver will come into effect should EPA rescind this prior action.[1]

Specifically, on September 27, 2019, NHTSA and EPA each finalized agency actions that addressed greenhouse gas (GHG) emissions standards for new motor vehicles and zero emissions vehicle (ZEV) mandates in a single *Federal Register* notice titled: "The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program" (SAFE 1).[2] In that notice, NHTSA codified regulatory text, and appendices, that provided its view that state regulation of fuel economy is preempted under the Energy Policy and Conservation Act (EPCA). On its part, EPA withdrew a waiver of preemption that had been previously granted to California for the

[1] 78 FR 2112 (January 9, 2013). EPA's waiver action on January 9, 2013 was for several California emission standards, including the low emission vehicle (LEV) III regulations for criteria pollutants. SAFE 1 withdrew elements of the January 9, 2013 waiver pertaining to certain ZEV mandate and GHG emission standards. Other elements of the ACC program waiver remain in effect.

[2] The SAFE 1 action is at 84 FR 51310 (September 27, 2019).

regulation of motor vehicle emissions through GHG standards and a ZEV mandate. EPA's action also took into consideration preemption regulations issued by NHTSA under EPCA in SAFE 1. On January 20, 2021, President Biden issued an Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The President directed each Federal agency to "immediately review" SAFE 1, and consider taking action "suspending, revising, or rescinding" it by April 2021.[3] Accordingly, EPA has conducted a review of both the legal and factual predicates for SAFE I. EPA now believes that there are significant issues with the SAFE 1 action, including the time elapsed since EPA's 2013 waiver decision (and associated reliance interests), the novel statutory interpretations set forth in SAFE 1, and whether EPA took proper account of the environmental conditions in California and the environmental consequences of the waiver withdrawal in SAFE 1. Further, subsequent to SAFE 1, EPA received several petitions for reconsideration, including one filed by California seeking clarification of the scope of the SAFE 1 action, one filed by California (jointly with a number of States and Cities), and one jointly filed by nongovernmental organizations that raised significant issues related to the agency's action in SAFE 1. EPA has evaluated each petition for reconsideration and believes there is merit in reviewing issues that petitioners have raised such as whether the withdrawal of the ACC program waiver was a valid exercise of EPA authority, and whether the Agency properly interpreted and applied the CAA preemption provisions. EPA has notified these petitioners that the agency will be addressing issues raised in their petitions as part of this proceeding.

In considering whether to rescind the action that withdrew portions of the ACC program waiver, EPA is seeking to determine whether it properly evaluated and exercised its authority to reconsider a previous waiver granted to CARB and whether the withdrawal was a valid and appropriate exercise of authority and consistent with judicial precedent.

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[3] This action is being issued only by EPA and, therefore, does not bear upon any future or potential action NHTSA may take regarding its decision or pronouncements in SAFE 1.

EPA is providing the following summary of sections of the Clean Air Act that are applicable to the Agency's review of the California Air Resources Board's (CARB's) new motor vehicle emissions program, an overview of CARB's ACC program waiver and subsequent EPA action to withdraw portions of the ACC program waiver pertaining to CARB's GHG emission standards and ZEV mandate in SAFE 1, an overview of prior EPA waiver actions applicable to CARB's GHG emission standards for motor vehicles, and a brief description of the petitions for reconsideration filed with EPA after the completion of SAFE 1 in order to provide the context for agency solicitation of comments, which can be found in section "III. Request for Comments." EPA is not soliciting comments on the 2013 ACC program waiver decision, and therefore has not reopened that decision for comments. Specifically, EPA is not soliciting comments on issues addressed in the ACC program waiver decision beyond those issues addressed in the final SAFE 1 action. EPA will treat any other comments it receives as beyond the scope of this reconsideration proceeding.

A. Scope of Preemption and Criteria for a Waiver under the Clean Air Act

Title II of the Clean Air Act, as amended, generally preempts states from setting emission standards for new motor vehicles. Section 209(a) provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.[4]

California is the only state that is eligible to seek and receive a waiver of preemption under the terms of section 209(b)(1). This section provides:

> The Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that the state standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the

[4] Section 209(a) of the Clean Air Act, 42 U.S.C. 7543(a).

Administrator finds that--

(A) the determination of the state is arbitrary and capricious,

(B) the state does not need the state standards to meet compelling and extraordinary conditions, or

(C) the state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[5]

Previous decisions granting California waivers of Federal preemption for motor vehicle emission standards have stated that State standards are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period or if the Federal and State test procedures impose inconsistent certification procedures.[6]

EPA has consistently interpreted Section 209(b) to require issuance of a waiver unless EPA finds that at least one of the three criteria is met.[7] As noted above, the three waiver criteria are properly seen as the criteria for denial. Prior to SAFE 1, EPA has consistently declined to consider other potential bases for denying a waiver such as Constitutional claims or the preemptive effect of other Federal statutes.[8] In addition, EPA, given the text, legislative history and judicial precedent, has consistently interpreted section 209(b) as placing the burden on the opponents of a waiver to demonstrate that one of the criterion for a denial has been met.[9] Thus,

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[5] Section 209(b)(1) of the Clean Air Act, 42 U.S.C. 7543(b)(1).

[6] To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the state and Federal requirements with the same test vehicle during the same test. *See, e.g.*, 43 FR 32182 (July 25, 1978).

[7] This is different from most waiver proceedings before the Agency, where EPA typically determines whether it is appropriate to make certain findings necessary for granting a waiver, and if the findings are not made then a waiver is denied. This reversal of the normal statutory structure embodies and is consistent with the congressional intent of providing deference to California to maintain its own new motor vehicle emissions program. In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on specifically listed criteria was to ensure that the Federal government did not second-guess state policy choices. *See* 40 FR 23102, 23103 (May 28, 1975);78 FR 2112, 2115 (January 9, 2013); 40 FR 23103–23104; *see also* LEV I waiver at 58 FR 4166 (January 13, 1993), Decision Document at 64. Similarly, EPA has stated its practice of leaving the decision on "ambiguous and controversial matters of public policy" to California's judgment. 78 FR 2112, 2115; 40 FR 23103, 23104; 58 FR 4166.

[8] "As EPA has stated on numerous occasions, section 209(b) of the Clean Air Act limits our authority to deny California's requests for waivers to the three criteria therein, and EPA has refrained from denying California's requests for waivers based on any other criteria. Where the Court of Appeals for the District of Columbia Circuit has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the court has upheld and agreed with EPA's determination." 78 FR 2112, 2145 (citing *Motor and Equipment Manufacturers Ass'n v. Nichols (MEMA II)*, 142 F.3d 449, 462–63, 466–67 (D.C. Cir. 1998), *Motor and Equipment Manufacturers Ass'n v. EPA* (*MEMA I*), 627 F.2d 1095, 1111, 1114–20 (D.C. Cir. 1979).

[9] *MEMA* at 1120–1121; *MEMA II*.

EPA's practice has been to defer and not to intrude in policy decisions made by California in adopting standards for protecting the health and welfare of its citizens.[10]

In 1977, Congress promulgated section 177 of the Clean Air Act, which permitted States to adopt California new motor vehicle emission standards for which a waiver of preemption has been granted if certain criteria are met.[11] Also known as the "opt-in" provision, section 177 of the Act, 42 U.S.C. 7507, provides:

> Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—
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> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
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> (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).
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> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

B. The ACC Program Waiver

On June 27, 2012, CARB notified EPA of its adoption of the ACC program regulatory package that contained amendments to its low-emission vehicle (LEV) and ZEV mandate and requested a waiver of preemption under section 209(b) to enforce regulations pertaining to this program.[12] The ACC program combined the control of smog and soot-causing pollutants and GHG emissions into a single coordinated package of requirements for passenger cars, light-duty

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[10] EPA is "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." *MEMA II*, 142 F.3d at 453 (quoting H.R. Rep. No.95-294, at 301-02 (1977)); EPA " 'is not to overturn California's judgment lightly,' " *Id*., at 463 (quoting H.R. Rep. No. 95–294, at 302 (1977), *reprinted in* 1977 U.S.C.C.A.N. at 1381).

[11] *Motor Vehicle Mfrs. Ass'n v. NYS Dep. of Envt'l Conservation*, 17 F.3d 521, 532 (2d Cir. 1994).

[12] CARB's June 12, 2012 waiver request (including its attachments) was included in EPA's Air Docket at EPA-HQ-OAR-2012-0562-0002 et seq. The waiver request and attachments have also now been placed in EPA's Air Docket pertaining to this reconsideration at EPA-HQ-OAR-2021-0257. A complete description of the ACC program, as it existed at the time that CARB applied for the 2013 waiver, can be found in the docket for the January 2013 waiver action, Docket No. EPA–HQ–OAR– 2012– 0562.

trucks, and medium-duty passenger vehicles (and limited requirements related to heavy-duty vehicles for certain model years). On August 31, 2012, EPA issued a notice of opportunity for public hearing and written comment on CARB's request and solicited comment on all aspects of a full waiver analysis under the criteria of section 209(b) of the CAA.[13] On January 9, 2013, EPA granted California's request for a waiver of preemption to enforce the ACC program regulations.[14]

Set forth in the ACC program waiver decision is a summary discussion of EPA's decision to depart from its traditional interpretation of section 209(b)(1)(B) (the second waiver prong) in the 2008 waiver denial for CARB's initial GHG standards for certain earlier model years along with EPA's return to the traditional interpretation in the waiver issued in 2009.[15] The traditional interpretation, which EPA stated is the better interpretation of section 209(b)(1)(B), calls for evaluating California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions. Because EPA received comment on this issue during the ACC program waiver proceeding, as it pertained to both CARB's GHG emission standards and ZEV mandate, the Agency once again recounted the interpretive history associated with standards for both GHG emissions and criteria air pollutants to explain EPA's belief that section 209(b)(1)(B) should be interpreted the same way for all air pollutants.[16] Applying this approach, and with deference to California, EPA found that it could not deny the waiver under the second waiver prong.[17] Without adopting an alternative interpretation, EPA noted that to the extent that it was appropriate to examine the need for CARB's GHG standards to meet compelling and extraordinary conditions, EPA had discussed at length in its 2009 GHG waiver decision that

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[13] 77 FR 53199 (August 31, 2012).
[14] 78 FR 2112 (January 9, 2013).
[15] 73 FR 12156 (March 6, 2008); 74 FR 32744 (July 8, 2009).
[16] 78 FR 2112, 2125-2128.
[17] *Id.* at 2129. "CARB has repeatedly demonstrated the need for its motor vehicle program to address compelling and extraordinary conditions in California. As discussed above, the term compelling and extraordinary conditions ''does not refer to the levels of pollution directly.'' Instead, the term refers primarily to the factors that tend to produce higher levels of pollution—geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems. California still faces such conditions."

California does have compelling and extraordinary conditions directly related to regulations of GHGs.[18] Similarly, to the extent that it was appropriate to examine the need for CARB's ZEV mandate, EPA noted that the ZEV mandate in the ACC program enables California to meet both its air quality and climate goals into the future. EPA recognized CARB's coordinated strategies reflected in the ACC program for addressing both criteria pollutants and greenhouse gases and the magnitude of the technology and energy transformation needed to meet such goals.[19] Therefore, EPA determined that to the extent the second waiver criterion should be interpreted to mean a need for the specific standards at issue, then CARB's GHG emission standards and ZEV mandate satisfy such a finding.[20]

Also included in the ACC program waiver is a discussion of the technological feasibility of the ACC program GHG emission standards and the ZEV mandate as evaluated under section 209(b)(1)(C).[21]

Further, in response to a comment that the waiver request for GHG emission standards should be denied because GHG standards relate to fuel economy and are expressly preempted by the Energy Policy and Conservation Act (EPCA), EPA explained that section 209(b) of the Act limits the Agency's authority to deny California's requests for waivers to the three criteria therein and that the Agency has consistently refrained from denying California's requests for waivers based on any other criteria. EPA also relied on judicial precedent as support.[22]

C. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (SAFE 1)

In 2018, NHTSA issued a proposal for the next generation of the Congressionally-mandated Corporate Average Fuel Economy (CAFE) standards that must be achieved by each manufacturer for its car and light-duty truck fleet while EPA revisited its light-duty vehicle GHG

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[18] *Id.* at 2129-2130.
[19] *Id.* at 2130-2131.
[20] *Id.* at 2129-2131.
[21] *Id.* at 2131-2143.
[22] *Id.* at 2145 ("Where the Court of Appeals for the District of Columbia Circuit has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the court has upheld and agreed with EPA's determination." *See MEMA II* at 462-63, *MEMA* I at 1114-20).

emissions standards for certain model years in the rulemaking titled: "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks."[23] EPA also proposed to withdraw the waiver for the ACC program GHG emission standards and ZEV mandate under both sections 209(b)(1)(B) and (C), based upon the Agency's exercise of its inherent authority to reconsider a previously granted waiver under the Clean Air Act. As part of EPA's asserted authority to reconsider that ACC program waiver issued in 2013, EPA noted the changed circumstances including its reassessment of section 209(b)(1)(B) as well as EPA's new assessment of the feasibility of CARB's standards under section 209(b)(1)(C). In addition, EPA noted that the proposal presented a unique situation to consider the implications of NHTSA's proposed conclusion of EPCA preemption for California's GHG emission standards and ZEV mandate. EPA proposed to conclude that state standards preempted under EPCA cannot be afforded a valid section 209(b) waiver and thus also proposed that, if NHTSA finalized its determination regarding California's GHG standards and ZEV mandate, it would be necessary to withdraw the waiver separate and apart from section 209(b)(1)(B) and (C).

On September 27, 2019, EPA and NHTSA published a final action titled: "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (SAFE 1) that promulgated regulations reflecting NHTSA's conclusion that EPCA preempted California's GHG standards and ZEV mandate. In the same action EPA withdrew the waiver of preemption for California to enforce the ACC program GHG and ZEV mandate on two grounds.[24] First, EPA posited that standards preempted under EPCA could not be afforded a valid waiver of preemption under section 209(b). EPA explained that agency pronouncements in the ACC program waiver decision on the historical practice of disregarding the preemptive effect of EPCA in the context of evaluating California's waiver applications "was inappropriately broad, to the extent it suggested that EPA is categorically forbidden from ever determining that a waiver

[23] 83 FR 42986 (August 24, 2018).
[24] 84 FR 51310 (September 27, 2019).

is inappropriate due to consideration of anything other than the 'criteria' or 'prongs' at CAA section 209(b)(1)(B)(A)–(C)."[25] EPA further explained that those pronouncements were made in waiver proceedings where the agency was acting solely on its own in contrast to a joint action with NHTSA such as SAFE 1. Additionally, EPA expressed intentions not to consider factors other than statutory criteria set out in section 209(b)(1)(A)–(C) in future waiver proceedings, but explained that addressing the preemptive effect of EPCA and its implications for EPA's waiver for California standards was called for in SAFE 1 because EPA and NHTSA were coordinating regulatory actions in a single notice.[26]

Second, EPA withdrew the waiver for GHG standards and ZEV mandate on two alternative grounds under the second waiver prong. Specifically, EPA determined that California does not need the GHG standards "to meet compelling and extraordinary conditions," under section 209(b)(1)(B) and even if California does have compelling and extraordinary conditions in the context of global climate change, California does not "need" the GHG standards, under section 209(b)(1)(B) because they will not meaningfully address global air pollution problems of the type associated with GHG emissions.[27]

EPA premised the agency's finding on a consideration of California's "need" for its own GHG and ZEV programs, instead of the "need" for a separate motor vehicle emission program to meet compelling and extraordinary conditions. In doing so, EPA read "such State standards" in section 209(b)(1)(B) as ambiguous with respect to the scope of agency analysis of California waiver requests and posited that reading this phrase as requiring EPA to only and always consider California's entire motor vehicle program would limit the application of this waiver prong in a way that EPA did not believe Congress intended. EPA further noted that the Supreme Court had found that Clean Air Act provisions may apply differently to GHGs than they do to traditional pollutants in *UARG v. EPA,* 134 S. Ct. 2427 (2014) (partially reversing the GHG

[25] *Id.* at 51338.
[26] *Id*.
[27] 84 FR 51310, 51328-51333.

"Tailoring" Rule on grounds that the section 202(a) endangerment finding for GHG emissions from motor vehicles did not compel regulation of all sources of GHG emissions under the Prevention of Significant Deterioration and Title V permit programs).

EPA then interpreted section 209(b)(1)(B) as turning on whether there is a particularized, local nexus between (1) pollutant emissions from sources, (2) air pollution, and (3) resulting impact on health and welfare.[28] EPA stated that these elements match the elements of the predicate finding EPA must make before regulating, under section 202(a)(1), and are evident in California's criteria-pollutant problems, which prompted Congress to enact the waiver provision.[29] Under this interpretation, EPA concluded that no such California nexus exists for greenhouse gases: (1) these emissions from California cars are no more relevant to climate-change impacts in the state than emissions from cars elsewhere; (2) the resulting pollution is globally mixed; and (3) climate-change impacts in California are not extraordinary to that state.[30] EPA further determined that "such State standards" in sections 209(b)(1)(B) and (C) should be read consistently, which was a departure from the traditional approach where this phrase is read as referring back to "in the aggregate" in section 209(b)(1).[31] EPA further reasoned that the most stringent regulatory alternative considered in the 2012 final rule and Final Regulatory Impact Analysis, which would have required a seven percent average annual fleetwide increase in fuel economy for MYs 2017–2025 compared to MY 2016 standards, was forecasted to decrease global temperatures by only 0.02 °C in 2100.[32]

Finally, as support for the determination that California did not need the ZEV mandate requirements to meet compelling and extraordinary conditions, EPA relied on a statement in the ACC program waiver support document where CARB noted that there were no criteria emissions

[28] *Id.* at 51339, 51347.
[29] *Id.* at 51339-5134040, 51348-451349.
[30] *Id.*
[31] *Id.* at 51345.
[32] *Id.* at 51349.

benefit in terms of vehicle (tank-to-wheel) emissions because its LEV III criteria pollutant fleet standard was responsible for those emission reductions.[33]

Regarding burden of proof in waiver proceedings, the agency posited that it was "not necessary to resolve this issue as regardless of whether a preponderance of the evidence or clear and compelling evidence standard is applied, the Agency was concluding that withdrawal of the waiver was appropriate."[34]

EPA did not finalize the withdrawal of the waiver under the third waiver criterion at section 209(b)(1)(C), as proposed, explaining instead that EPA and NHTSA were not finalizing the proposed assessment regarding the technological feasibility of the Federal GHG standards for MY 2021 through 2025 in SAFE 1.[35]

In withdrawing the waiver, EPA asserted that authority to reconsider and withdraw the grant of a waiver for the ACC program was implicit in section 209(b) given that the authority to revoke a waiver is implied in the authority for EPA to grant a waiver. The Agency claimed further support for authority based on the legislative history of section 209(b) and the judicial principle that agencies possess inherent authority to reconsider their decisions:

> The legislative history from the 1967 CAA amendments where Congress enacted the provisions now codified in section 209(a) and (b) provides support for this view. The Administrator has "the right . . . to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver." S. Rep. No. 50–403, at 34 (1967).[36]

EPA also noted that, subject to certain limitations, administrative agencies possess inherent authority to reconsider their decisions in response to changed circumstances:

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[33] "There is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions." CARB ACC program waiver request at 15 (May 2012), EPA–HQ–OAR– 2012–0562–0004.
[34] 84 FR 51310, 51344 n.268. At proposal, EPA also took comment on the burden of proof in waiver proceedings even though the Agency had initiated reconsideration of the grant of the ACC program waiver and such evidentiary aspects for section 209(b) waivers had long been settled. *Motor and Equip. Mfrs Ass'n. v. EPA,* 627 F.2d 1095, 1121, n.19, 1126 (D.C. Cir. 1979) (*MEMA I*).
[35] 84 FR 51310, 51350. EPA had proposed to determine, as an additional basis for the waiver withdrawal, that new GHG standards and ZEV mandate for 2021 through 2025 model years are not consistent with section 202(a) of the Clean Air Act, including how costs should be properly considered. EPA's waiver for CARB's ACC program, issued in 2013, fully evaluated this criterion.
[36] *Id.* at 51332.

> It is well settled that EPA has inherent authority to reconsider, revise, or repeal past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. This authority exists in part because EPA's interpretations of the statutes it administers "are not carved in stone." *Chevron U.S.A. Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 863 (1984). An agency ''must consider varying interpretations and the wisdom of its policy on a continuing basis.'' *Id.* at 863–64. This is true when, as is the case here, review is undertaken "in response to . . . a change in administration." *National Cable & Telecommunications Ass'n* v. *Brand X internet Services,* 545 U.S. 967, 981 (2005). The EPA must also be cognizant where it is changing a prior position and articulate a reasoned basis for the change. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).[37]

EPA opined that the text, structure, and context of section 209(b) support EPA's interpretation that it has this authority. EPA further asserted that no cognizable reliance interests had accrued sufficient to foreclose EPA's ability to exercise this authority.[38] EPA stated:

> In tying the third waiver prong to CAA section 202(a), Congress gave a clear indication that, in determining whether to grant a waiver request, EPA is to engage in a review that involves a considerable degree of future prediction, due to the expressly future-oriented terms and function of CAA section 202(a). In turn, where circumstances arise that suggest that such predictions may have been inaccurate, it necessarily follows that EPA has authority to revisit those predictions with regard to rules promulgated under CAA section 202(a), the requirements of that section, and their relation to the California standards at issue in a waiver request, and, on review, withdraw a previously granted waiver where those predictions proved to be inaccurate.[39]

EPA also disagreed with some commenters' assertions that ostensible reliance interests foreclose withdrawal of the waiver for MY 2021–2025 GHG and ZEV standards.[40] EPA stated

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[37] *Id.* at 51333.

[38] *Id.* at 51331-51337.

[39] *Id.* at 51332, 51334. As noted above, however, EPA did not withdraw the ACC waiver based on the third waiver prong of Section 209(b). 84 FR at 51334. Further, by way of example, EPA stated that California as well as other parties, such as section 177 states, were on notice that EPA would be conducting a midterm evaluation (MTE) of the Federal GHG emission standards and that such circumstances indicate a lack of sufficient reliance interests to preclude EPA's reconsideration of the ACC waiver issued in 2013. As relevant here, EPA's October 15, 2012 rulemaking setting GHG emission standards for 2017 and later model years included a commitment to perform the MTE for the Federal 2022 through 2025 model year standards. 77 FR 62624 (October 15, 2012). The MTE called for EPA to issue a final determination regarding whether the Federal MY 2022–2025 GHG standards remained appropriate under section 202(a). On January 12, 2017, EPA completed the MTE and determined that GHG standards for MY 2022–2025 remained appropriate under section 202(a). Subsequently, EPA withdrew the January 2017 final determination and revised the finding of appropriateness, concluding instead that GHG standards for MY 2022–2025 were not appropriate and, therefore, should be revised. 83 FR 16077 (April 13, 2018).

[40] According to commenters "California, and the section 177 states that have elected to adopt those standards as their own have incurred reliance interests ultimately flowing from those standards. For instance, California has incurred reliance interests because it is mandated to achieve an aggressive GHG emissions reduction target for 2030…"[b]ut EPA provides no justification for applying that change in policy retroactively to upend a five-year old decision to which substantial reliance interests have attached." 84 FR 51310, 51331, 51334-51335.

that "CAA section 177 States do not have any reliance interests that are engendered by the withdrawal of the waiver for the MY 2021-2025 GHG and ZEV standards."[41]

In SAFE 1, EPA provided an interpretation of section 177 of the CAA, including the notion that this section does not authorize other states to adopt California's greenhouse gas emission standards for which EPA had granted a waiver of preemption under section 209(b). Although section 177 does not require States that adopt California emission standards to submit such regulations for EPA review, EPA chose to nevertheless provide an interpretation that this provision is available only to states with approved nonattainment plans. EPA stated that nonattainment designations exist only as to criteria pollutants and greenhouse gases are not criteria pollutants; therefore, states could not adopt GHG standards under section 177.[42] Notably, California in previous waiver requests has addressed the benefits of GHG emissions reductions as it relates to ozone.

D. Prior EPA Waiver Practice

For over fifty years, EPA has evaluated California's requests for waivers of preemption under section 209(b), primarily considering CARB's motor vehicle emission program that addresses criteria pollutants.[43] More recently, the Agency has been tasked with determining how section 209(b)(1)(B) should be interpreted and applied in the context of GHG standards and California's historical air quality problems, including the public health and welfare challenge of climate change. Although the withdrawal and revocation of the waiver for CARB's ACC

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[41] *Id.* at 51336. Regarding states that had adopted the GHG standards into state implementation plans (SIPs), under section 177, EPA explained that because "Title I does not call for NAAQS attainment planning as it relates to GHG standards, those States that may have adopted California's GHG standards and ZEV standards for certain MYs would also not have any reliance interests. 84 FR 51310, 52335. "EPA did, however, acknowledge the possibility of SIP implications arising from the withdrawal of these standards and indicated that the agency would engage in future actions to address those implications. *Id.* at 51338, n. 256.

[42] *Id.* at 51350-51351. Since EPA was offering its views of section 177 in the abstract, its interpretation of section 177 in SAFE 1 did not have direct and appreciable legal consequences and was not a "final action" of the agency.

[43] EPA notes that the 1990 amendments to the Clean Air Act added subsection (e) to section 209. Subsection (e) addresses the preemption of State or political subdivision regulation of emissions from nonroad engines or vehicles. Section 209(e)(2)(A) sets forth language similar to section 209(b) in terms of the criteria associated with EPA waiving preemption, in this instance for California nonroad vehicle and engine emission standards. Congress directed EPA to implement subsection (e). *See* 40 CFR Part 1074. EPA review of CARB requests submitted under section 209(e)(2)(A)(ii) includes consideration of whether CARB needs its nonroad vehicle and engine program to meet compelling and extraordinary conditions. *See* 78 FR 58090 (September 20, 2013).

program, in SAFE 1, represents a snapshot of this task, it is important to examine EPA's waiver practice in general, including prior waiver decisions pertaining to CARB GHG emission standards, in order to determine whether EPA properly reconsidered the ACC program waiver and properly applied the waiver criterion in section 209(b)(1)(B) in SAFE 1. A summary of EPA's historical waiver practice and decisions regarding CARB's regulation of criteria and GHG emissions, including EPA's consideration of the second waiver prong, is provided below.

EPA has consistently interpreted and applied the second waiver criterion by considering whether California needed a separate mobile source program as compared to the individual standards at issue to meet compelling and extraordinary conditions. As previously noted, this is known as the "traditional approach" of interpreting section 209(b)(1)(B).[44] At the same time, in the event and in response to commenters that have argued that EPA is required to examine the specific standards at issue in the waiver request, EPA's practice has been to retain the traditional approach but to nevertheless review the specific standards to determine whether California needs such standards. This has not meant that EPA has adopted an "alternative approach" and required a demonstration for the need of specific standards; rather, this additional Agency review has been afforded to address commenters' concerns. For example, EPA granted an authorization for CARB's In-use Off-road Diesel Standards (Fleet Requirements) that included an analysis under both approaches.[45]

The task of interpreting and applying section 209(b)(1)(B) to California's GHG standards and consideration of the state's historical air quality problems that now include the public health and welfare challenge of climate change began in 2005, with CARB's waiver request for 2009 and subsequent model years' GHG emission standards. On March 6, 2008, EPA denied the waiver request based on a new interpretive finding that section 209(b) was intended for

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[44] 49 FR 18887, 18890 (May 3, 1984).

[45] 78 FR 58090 (Sept. 20, 2013). The United States Court of Appeals for the Ninth Circuit upheld EPA's grant of a waiver of preemption under either approach. *Dalton Trucking v. EPA*, No. 13-74019 (9thCir. 2021) (finding that EPA was not arbitrary in granting the waiver of preemption under either approach). The court opinion noted that "[t]his disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

California to enforce new motor vehicle emission standards that address local or regional air pollution problems, and an Agency belief that California could not demonstrate a "need" under section 209(b)(1)(B) for standards intended to address global climate change problems. EPA also employed this new alternative interpretation to state a belief that the effects of climate change in California are not compelling and extraordinary in comparison with the rest of the country. Therefore, within this waiver denial, EPA no longer evaluated whether California had a need for its motor vehicle emission program to meet compelling and extraordinary conditions (the traditional interpretation) but rather focused on the specific GHG emission standard in isolation and not in conjunction with the other motor vehicle emission standards for criteria pollutants.

In 2009, EPA initiated a reconsideration of the 2008 waiver denial based on a belief that significant issues had been raised since the denial of the waiver.[46] The reconsideration resulted in granting CARB a waiver for its GHG emission standards commencing in the 2009 model year.[47] This led to a rejection of the Agency's novel alternative interpretation of the second waiver prong announced in the previous waiver denial. Instead, EPA returned to its traditional approach of evaluating California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions because the agency viewed it as the better interpretation. Under the traditional interpretation of the second waiver prong, EPA found that the opponents of the waiver had not met their burden of proof to demonstrate that California did not need its motor vehicle emission program to meet compelling and extraordinary conditions. EPA also determined that, even if the alternative interpretation were to be applied, the opponents of the waiver had not demonstrated that California did not need its GHG emissions standards to meet compelling and extraordinary conditions.[48] Since then EPA has employed the traditional approach for evaluating California's need for a separate motor vehicle emissions program in

[46] 74 FR 7040 (February 12, 2009).
[47] 74 FR 32744 (July 8, 2009).
[48] *Id.* at 32759-32767. *See also* 76 FR 34693 (June 14, 2011).

waiver requests. Notably, EPA also relied on the traditional approach in granting the waiver for the ACC program.

Within the context of EPA's evaluation of the second waiver prong and California's GHG emission standards for on-highway vehicles, EPA notes the existence of two waivers of preemption for CARB's heavy-duty tractor-trailer (HD) GHG emission standards.[49] Once again, EPA relied upon its traditional approach of evaluating California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions and found that no evidence had been submitted to demonstrate that California no longer needed its motor vehicle emissions program to meet compelling and extraordinary conditions.[50] EPA's second waiver for the HD GHG emission standards made a similar finding that California's compelling and extraordinary conditions continue to exist under the traditional approach for the interpretation of the second waiver criterion.[51]

F. Petitions for Reconsideration

After it issued SAFE 1, EPA received multiple petitions for reconsideration urging the agency to reconsider the withdrawal of the ACC program's GHG standards and ZEV mandate on

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[49] The first HD GHG emissions standard waiver related to certain new 2011 and subsequent model year tractor-trailers. 79 FR 46256 (August 7, 2014). The second HD GHG emissions standard waiver related to CARB's "Phase I" regulation for 2014 and subsequent model year tractor-trailers. 81 FR 95982 (December 29, 2016).

[50] Relatedly, California explained the need for these standards based on projected "reductions in NOx emissions of 3.1 tons per day in 2014 and one ton per day in 2020 due to the HD GHG Regulations. California state[d] that these emissions reductions will help California in its efforts to attain applicable air quality standards. California further projects that the HD GHG Regulations will reduce GHG emissions in California by approximately 0.7 million metric tons (MMT) of carbon dioxide equivalent emissions (CO2e) by 2020." 79 FR 46256, 46261.

[51] 81 FR 95982, 95987. At the time of CARB's Board adoption of the HD Phase I GHG regulation, CARB determined in Resolution 13–50 that California continues to need its own motor vehicle program to meet serious ongoing air pollution problems. CARB asserted that "[t]he geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish vehicle standards in 1967 still exist today. EPA has long confirmed CARB's judgment, on behalf of the State of California, on this matter." (See EPA Air Docket at regulations.gov at EPA-HQ-OAR-2016-0179-0012). In enacting the California Global Warming Solutions Act of 2006, the Legislature found and declared that "Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to the marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other health-related problems."

various grounds. EPA has granted the following petitions for reconsideration of SAFE 1 that were pending before the Agency:[52]

1. A Petition for Clarification/Reconsideration submitted by the State of California (the California Attorney General and the California Air Resources Board), on October 9, 2019 (California Petition for Clarification).[53] The Petitioner sought both a clarification and reconsideration of the scope of SAFE 1 as it related to the withdrawal of portions of the ACC program waiver. Regarding clarification, the Petitioner cited somewhat contradictory statements in SAFE 1 and indicated that there was confusion regarding model years that were affected by the waiver withdrawal.[54] The Petitioner also requested reconsideration on grounds that the final action relied on analyses and justifications not presented at proposal and thus, was beyond the scope of the proposal.[55]

2. A Petition for Reconsideration was submitted by several States and Cities on November 26, 2019 (States and Cities' Petition).[56] This petition presented several issues, including whether EPA failed to articulate a valid rationale to support its authority to revoke the GHG standards and ZEV mandate and instead relied on facially unclear theories not made available at proposal for public comment.

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[52] Separately from this action, EPA has notified the Parties to each of the Petitions for Reconsideration and informed them that EPA is initiating an action under the Administrative Procedure Act to reconsider SAFE 1. Copies of EPA's reply letters can be found in the public docket at EPA-HQ-OAR-2021-0257.

[53] Copies of the petitions for reconsideration can be found in the public docket at EPA-HQ-OAR-2021-0257.

[54] The California Petition for Clarification notes "[i]n the Final Actions, EPA makes statements that are creating confusion, and, indeed, appear contradictory, concerning the temporal scope of its action(s)—specifically, which model years are covered by the purported withdrawal of California's waiver for its GHG and ZEV standards. In some places, EPA's statements indicate that it has limited its action(s) to the model years for which it proposed to withdraw and for which it now claims to have authority to withdraw—namely model years 2021 through 2025. In other places, however, EPA's statements suggest action(s) with a broader scope—one that would include earlier model years."

[55] "To the extent that EPA's response to this petition would result in final action(s) beyond the scope of what EPA proposed, or would contain analyses or justifications not included in the Proposal (such as purported justifications for broader withdrawal authority), then EPA must withdraw at least the portion of the Final Actions that extend beyond the Proposal, issue a revised proposal and accept and consider public comment before taking any final action." California Petition for Clarification at 9.

[56] *See* EPA-HQ-OAR-2021-0257. This Petition was joined by the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, Michigan, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the Cities of Los Angeles, New York, San Francisco, and San Jose..

Petitioners further asserted that EPA unlawfully changed course in SAFE 1 by considering (and relying on) the purported preemptive effect of EPCA, which is outside the confines of section 209(b) and argued that the agency rationale for withdrawing the waiver was flawed. They also disagreed with the Agency's interpretation of section 209(b)(1)(B) and EPA's reassessment of the factual record that existed at the time of the ACC program waiver, which led to a new finding under the second waiver prong and a new result in SAFE 1. They asserted, for example, that EPA's new reliance on the "endangerment provision" in Section 202(a) does not support EPA's section 209(b)(1)(B) interpretation or conclusion and that the use of the equal sovereignty principle to inform EPA's interpretation of "compelling and extraordinary conditions" was inappropriate. Additionally, Petitioners asserted that EPA should have considered all supporting documentation instead of only considering the 2013 waiver record and that EPA failed to consider new evidence that further demonstrated California's need for GHG emission standards and ZEV mandates to address compelling and extraordinary conditions in California.

3. Petition for Reconsideration by several non-governmental organizations on November 25, 2019 (NGOs' Petition).[57] Petitioners asserted that EPA's reconsideration of the ACC program waiver was not a proper exercise of agency authority and that EPA relied on improper considerations in its decision-making. Petitioners cast the agency's rationale as "pretextual." The NGOs' Petition further noted that EPA did not properly interpret and apply the second waiver prong and markedly ignored new evidence that further demonstrated California's need for its GHG emission standards and ZEV mandates to address compelling and extraordinary conditions in California.[58]

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[57] *See* EPA-HQ-OAR-2021-0257. This Petition was joined by The Center for Biological Diversity, Chesapeake Bay Foundation, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and the Union of Concerned Scientists.

[58] Among the comments is a letter from the CARB, dated June 17, 2019, in support of Petitioners' arguments that EPA improperly considered the reliance interests associated with the ACC program waiver and that EPA improperly understood the scope of the need for the ZEV mandate and GHG standards to address a variety of transportation conformity obligations as well as State Implementation Plan planning requirements.

V. Request for Comment

When EPA receives new waiver requests from CARB, EPA traditionally publishes a notice of opportunity for public hearing and comment and then, after the comment period has closed, publishes a notice of its decision in the *Federal Register*. EPA believes it is appropriate to use the same procedures for reconsidering SAFE 1. EPA notes that, consistent with caselaw and EPA's past practice for California waivers, this proceeding is subject to the Administrative Procedure Act (APA) and is considered an informal adjudication under the APA. EPA encourages interested parties to provide comments on the topics below for consideration by EPA, in the context of reconsidering SAFE 1 and reaching a decision on rescinding that prior agency action. As noted below, EPA seeks public comment, in the context of SAFE 1 and now the Agency's reconsideration, on whether the Agency properly exercised its authority in reconsidering the ACC program waiver and whether the second waiver prong at section 209(b)(1)(B) was properly interpreted and applied. Additionally, EPA seeks comment on whether EPA had the authority in the SAFE 1 context to interpret section 177 of the CAA and whether the interpretation was appropriate, as well as whether EPA properly considered EPCA preemption and its effect on California's waiver. EPA will take all relevant comments into consideration before taking final action.

The full waiver analysis, for new waiver requests, includes consideration of the following three criteria: whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

In contrast, in this instance EPA is not considering an initial waiver request (e.g., the 2012 ACC program waiver request from CARB, which EPA granted long ago, in 2013). Rather, EPA is now in the position of reconsidering the Agency's prior withdrawal of a waiver action

(SAFE 1) for the purpose of determining whether the withdrawal was a valid exercise of the Agency's authority and consistent with judicial precedent and whether the agency's action in SAFE 1 should now be rescinded. Relatedly, certain ZEV mandate and GHG emission standards within the ACC program would become effective should EPA rescind SAFE 1.

EPA's purpose in soliciting public comment is to determine whether SAFE 1 was a valid and appropriate exercise of the Agency's authority. EPA is only reconsidering SAFE 1 and not reopening the ACC program waiver decision for comments. Therefore, EPA is not soliciting comments on issues raised and evaluated by EPA in the 2013 ACC program waiver decision that were not raised and evaluated in the final SAFE 1 decision. EPA intends to treat any such comments as beyond the scope of this action.

EPA is seeking to determine whether it properly evaluated and exercised its authority in reconsidering a previous waiver granted to CARB and whether the withdrawal was a valid exercise of authority and consistent with judicial precedent. EPA specifically seeks comment on the matters raised in the Petitions for Reconsideration as they pertain to these evaluations.

EPA is interested in any information or comments regarding EPA's inherent or implied authority to reconsider previously granted waivers. In particular, to the extent EPA has such authority, EPA seeks comments as to whether there are particular factors or issues that the Agency is required to take into consideration, and whether EPA properly evaluated such factors when reaching the decision in SAFE 1 to reconsider the ACC program waiver and withdraw elements of it. For example, was it permissible for EPA to withdraw elements of the ACC program waiver over five years after it was issued? Were the grounds EPA provided in SAFE 1 a valid basis for withdrawing the identified elements of the ACC program waiver? Did EPA properly identify and consider any relevant reliance interests, such as the inclusion of GHG emission standards and ZEV mandates in approved SIPs, in its SAFE 1 action? Similarly, are there particular factors or reliance interests that EPA should consider in reconsidering the SAFE 1 action and recognizing the validity of EPA's 2013 ACC program waiver?

EPA's decision to change course and withdraw the ACC program waiver, as it related to CARB's GHG emission standards and EPA's finding that such standards were only designed to address climate change and a global air pollution problem, was based in large part on a new interpretation of section 209(b)(1)(B) – the second waiver prong regarding whether California "needs such standards to meet compelling and extraordinary conditions." EPA is also interested in any new or additional information or comments regarding whether it appropriately interpreted and applied section 209(b)(1)(B) in SAFE 1. For example, was it permissible for EPA to construe section 209(b)(1)(B) as calling for a consideration of California's need for a separate motor vehicle program where criteria pollutants are at issue and a consideration of California's specific standards where GHG standards are at issue?

Likewise, EPA's decision to withdraw the ACC program waiver as it relates to California's ZEV mandate, based on the same new interpretation and application of the second waiver prong, rested heavily on the conclusion that California only adopted the ZEV program to achieve GHG emission reductions. EPA recognizes that this conclusion, in turn, rested solely on a specific reading of CARB's ACC program waiver request.[59] EPA requests comment on these specific conclusions and readings as well as within the context of environmental conditions in California whether the withdrawal of the ACC program waiver as it applied to the ZEV mandate was permissible and appropriate, under applicable factors identified above and in relevant caselaw.

We also seek comment on EPA's action in SAFE 1 regarding section 177 of the CAA. Specifically, EPA seeks comment on whether it was appropriate for EPA to provide an interpretation of section 177 within the SAFE 1 proceeding. To the extent it was appropriate to provide an interpretation, EPA seeks comment on whether section 177 was properly interpreted and whether California's mobile source emission standards adopted by states pursuant to Section

[59] "Regarding the ACC program ZEV mandate requirements, CARB's waiver request noted that there was no criteria emissions benefit in terms of vehicle (tank-to-wheel—TTW) emissions because its LEV III criteria pollutant fleet standard was responsible for those emission reductions." 84 FR at 51330.

177 may have both criteria emission and GHG emission benefits and purposes.

As explained above, SAFE 1 represented a unique and unprecedented circumstance where two Federal agencies issued a joint notice and provided separate interpretive opinions regarding their respective federal preemption statutes.[60] Although EPA has historically declined to look beyond the waiver criteria in section 209(b) when deciding the merits of a waiver request from CARB, in SAFE 1 EPA chose not only to void portions of a waiver it had previously granted, but also to evaluate the effect of a pronouncement of preemption under EPCA on an existing Clean Air Act waiver. We seek comment on whether EPA properly considered and withdrew portions of the ACC program waiver pertaining to GHG standards and the ZEV mandate based on NHTSA's EPCA preemption action, including whether EPA has the authority to withdraw an existing waiver based on a new action that is beyond the scope of section 209 of the CAA. Because EPA relied on NHTSA's regulation on preemption, what significance should EPA place on the repeal of that regulation if NHTSA does take final action to do so?

Determination of Nationwide Scope or Effect

Section 307(b)(1) of the CAA governs judicial review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to EPA complete discretion whether to invoke the exception in (ii). [61]

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[60] The September 27, 2019 joint agency action is properly considered as two severable actions, a rulemaking by NHTSA and a final informal adjudication by EPA.

[61] In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator intends to take into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of agency resources.

In addition to California, thirteen other states and the District of Columbia have adopted California's greenhouse gas standards.[62] The other states are New York, Massachusetts, Vermont, Maine, Pennsylvania, Connecticut, Rhode Island, Washington, Oregon, New Jersey, Maryland, Delaware, and Colorado. These jurisdictions represent a wide geographic area and fall within seven different judicial circuits.

If the Administrator takes final action to revise or rescind SAFE 1, then, in consideration of the effects of SAFE 1 not only on California, but also on those states that had already adopted California's standards under section 177, to the extent a court finds this action to be locally or regionally applicable, the Administrator intends to exercise the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of "nationwide scope or effect" within the meaning of CAA section 307(b)(1).[63]

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Michael S. Regan,
Administrator.

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[62] In addition, other states are currently in the process of adopting California standards.

[63] In the report on the 1977 Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that the "nationwide scope or effect" exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95-294 at 323-24, reprinted in 1977 U.S.C.C.A.N. 1402-03.